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Supreme Court, U.S.
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No. 01-658

IN THE

Supreme Court of the United States

HAROLD McGUIRE,

Petitioner,

v.

LOWE'S HOME CENTERS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent, Lowe's Home Centers, Inc., is a wholly-owned subsidiary of the publicly held company, Lowe's Companies, Inc.

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COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case omits and misstates several important facts. Therefore, Respondent's Counterstatement of the Case will address these factual inaccuracies and omissions.

Petitioner, Harold McGuire ("McGuire"), was hired as an hourly employee by Respondent, Lowe's Home Centers, Inc. ("Lowe's"), in 1992 at the age of 47. (R. 12, McGuire Depo. at 19). McGuire was quickly promoted to Department Manager, and then to Zone Assistant Manager in July of 1993. (R. 12, McGuire Depo. at 21-22).

By the summer of 1994, however, McGuire began experiencing problems interacting with female employees. Specifically, three female employees complained to Jeff Rowe ("Rowe"), the Store Manager at the time, that McGuire had treated them with hostility and disrespect. (R. 32, Summary Judgment Memorandum ("S. J. Mem.") Exhibit A and Attachments 1, 2, 3, 4 and 5 thereto). Rowe verbally warned McGuire to cease such abrasive conduct. (R. 32, S. J. Mem. Exhibit A and Attachment 6 thereto). Also, due to the recent complaints, Rowe only awarded McGuire a 3% pay raise instead of the normal 3.5% to 5.5% merit increase. (R. 32, S. J. Mem. Exhibit A and Attachments 7 and 8 thereto).

In February of 1996, Andy Heath ("Heath") became the new Store Manager. That spring, Jim Sowards (DOB 8/22/57) interviewed for and was awarded the position of Operations Manager by Heath and Jan Lambert (DOB 1/23/49), the District Manager. (R. 32, S. J. Mem. Exhibits B and D). According to McGuire, none of the three zone assistant

managers, all of whom were less than 40 years of age except McGuire, were considered for the position. (R. 12, McGuire Depo. at 137-138).

In the spring of 1996, Heath assigned McGuire to Zone 6 which, according to McGuire, is where store managers place their strongest zone assistant manager. (R. 12, McGuire Depo. at 23-26). By September of 1996, however, McGuire was again the subject of complaints by two female employees. The complaints included allegations of disrespect and sexually harassing remarks. McGuire was admonished to treat employees with respect and advised that sexual harassment would not be tolerated. (R. 32, S. J. Mem. Exhibit B and attachment 1 thereto).

In January of 1997, Heath asked McGuire if he was interested in interviewing for a *District* Operations Manager position.[1] McGuire asked Heath "what was his personal opinion of [him]." McGuire claims that Heath's response was that McGuire reminded him of a "fat, middle-aged man" or "old man." McGuire could not remember whether McGuire used the word "old" or not. (R. 12, McGuire Depo. at 186-187). McGuire admits that he didn't think the statement was intended to be insulting. (R. 12, McGuire Depo. at 187).

Heath's interest in promoting McGuire was quickly overshadowed by a third round of more serious complaints

1. McGuire's Petition incorrectly implies that this is the position he was discriminatorily denied in favor of Jim Sowards. (Petition, "Pet.", p. 7). That is not the case. The job McGuire claims he was discriminatorily denied was the *Operations Manager* position awarded to Jim Sowards in the spring of *1996*. (R. 12, McGuire Depo. at 137-138). McGuire has never claimed that he was discriminatorily denied the *District Operations Manager* position in *1997*.

by five female employees. On February 8, 1997, Michelle Sluss complained to Heath that McGuire made several sexually harassing remarks to her. (R. 32, S. J. Mem. Exhibit B and Attachment 2 thereto). During Heath's investigation of the complaint, four more female employees made detailed written complaints that McGuire had sexually harassed them. (R. 32, S. J. Mem. Exhibit B and Attachments 2 and 3). At the conclusion of the investigation, Heath submitted the written statements to Lambert and the Human Resource Director, Jake Pearce, who were both within the protected age group. (R. 32, S. J. Mem. Exhibit B and D).

McGuire's Petition wrongly asserts that Heath demoted him. (Pet., p. 5). To the contrary, all the evidence indicates that Pearce and Lambert jointly decided to demote McGuire. (R. 32, S. J. Memo. Exhibit B). Lambert filled out and presented McGuire with an Employee Counseling Report which informed him of his demotion. McGuire's Petition incorrectly asserts that "Heath told McGuire that he had been accused of sexual harassment," and that "Heath refused to hear McGuire's side of the sexual harassment allegations against him." (Pet., pp. 5, 8). McGuire admits that it was Lambert who "conducted the meeting," in her office, and it was Lambert who advised McGuire of his demotion — Heath merely "sat in on it." (R. 12, McGuire Depo. at 146-147, 166). Even McGuire "assumed" Lambert made the demotion decision. (R. 12, McGuire Depo. at 166). Lambert also gave McGuire an opportunity to make written comments to the allegations, but he declined to do so. (R. 12, McGuire Depo. at 169)

Based on the aforementioned evidence of record, the U.S. District Court for the Eastern District of Kentucky granted summary judgment for Lowe's. McGuire then appealed to the U.S. Court of Appeals for the Sixth Circuit which affirmed

the District Court's dismissal based upon the reasoning of that court as outlined in its 22 page written opinion. (Petitioner's Appendix, "App.", pp. 3a and 4a-25a).

REASONS FOR DENYING THE WRIT

I. THERE ARE NO "COMPELLING REASONS" TO GRANT THE WRIT.

A petition for a writ of certiorari will be granted "only for compelling reasons." Sup. Ct. R. 10. A principal reason for granting such a petition is to resolve conflicts among the courts. *Braxton v. United States*, 500 U.S. 344, 347, 111 S. Ct. 1854, 1857 (1991). "Rarely" is a petition granted for "misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Here, McGuire's petition is premised, in part, on the allegation that the Sixth Circuit "wrongly applied the law" with respect to ambiguous or stray remarks and admissibility of statistical evidence. (Pet., p. 18). Lowe's contends that the Sixth Circuit properly applied the law, but even if the Sixth Circuit erred in its application, the petition should still be denied.

First, certiorari is rarely granted for a misapplication of the law, but more importantly, the correct result was reached by the Sixth Circuit on yet other grounds. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184, 79 S. Ct. 710, 713 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation."). Here, the Sixth Circuit properly determined that McGuire failed to state a prima facie case with respect to his discriminatory demotion claim. Adopting the reasoning of the district court, the Sixth Circuit held that

McGuire's prima facie case failed because there was no evidence that he received harsher treatment than younger similarly-situated employees.[2] (App., pp. 3a and 15a-17a). Consequently, the statistical evidence and stray remark issues, both of which go to the plaintiff's burden of showing pretext, need never come into play.

The second half of McGuire's petition is based upon the "manner in which" the Sixth Circuit reached its decision and "not so much the result." (Pet., p. 13). McGuire argues that the Sixth Circuit's adoption of the district court's opinion inadequately addresses the issues on appeal and that this Court should issue guidelines for acceptable appellate opinions. (Pet., pp. 14, 16). Certiorari should not be granted because McGuire concedes that his issue has little to do with the result reached. *See Monrosa, supra*. Further, this Court has indicated that it "does not sit to satisfy a scholarly interest." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S. Ct. 614, 616 (1955). Where the issue goes to the "manner" and not the "result," as in this case, the interest in the issue can be little more than academic.

For the aforementioned reasons, McGuire's petition fails to identify any "compelling reasons" for granting the writ; and therefore, the writ should be denied at the outset. Even if McGuire's reasons for granting the writ had some superficial appeal, his legal arguments are nonetheless flawed.

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2. McGuire's petition does not argue that the Sixth Circuit wrongly decided this legal issue which is fatal to his claim.

II. PETITIONER'S RIGHTS WERE PROPERLY VINDICATED BY THE SIXTH CIRCUIT.

Contrary to McGuire's assertion, the Sixth Circuit addressed all of the issues and arguments before it. (Pet., p. 14). As indicated by the Sixth Circuit's *per curiam* opinion, it "carefully considered the record on appeal, the briefs of the parties, and the applicable law," and based upon its consideration, the court affirmed the judgment of the district court for the reason enunciated in that court's "detailed written opinion." (App., p. 2a-3a). In so holding, the Sixth Circuit acknowledged that the district court had "carefully analyzed the law," and therefore, "the issuance of a detailed written opinion by this Court would be duplicative and serve no useful purpose." (App., p. 3a).

Opinions from this Court and the Federal Courts of Appeal, as well as the Federal and Sixth Circuit Rules of Appellate Procedure, all support the propriety of the opinion in the case at hand. As this Court has recognized, the issuance of written opinions by the appellate courts is strictly a discretionary matter:

> [C]ourts of appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances.

Taylor v. McKeithen, 407 U.S. 191, 194, 92 S. Ct. 1980, 1982 (1972); *see also Curci v. United States*, 577 F.2d 815, 818 (2d Cir. 1978) ("the scope and length of an [appellate] opinion rests in the sound discretion of the judicial body").

Further, there is no requirement in the law that federal appellate court decisions must be accompanied by written opinions, much less detailed independent written opinions as McGuire would have this Court require. *See Furman v. United States*, 720 F.2d 263, 264 (2d Cir. 1983) (acknowledging that federal appellate courts are not required by law to issue written opinions). The state court cases cited by McGuire are distinguishable in that each state represented has adopted its own procedures for appellate review. For example, in *State Bar of Texas v. Evans*, 774 S.W.2d 656, 658-59 n.6 (Tex. 1989), the Texas Supreme Court was bound by former Texas Rule of Appellate Procedure (Tx. RAP) 90[3] which required the Court of Appeals to "address every issue raised and necessary to the final disposition of the appeal." Likewise, the court in *Smith v. Ohio Northern Univ.*, 514 N.E.2d 142, 144 (Ohio App. 1986), was subject to Ohio Appellate Rule 12 which required the appellate court to address "each assignment of error and give reasons in writing for its decision," and the court in *Siegel v. Levy Org. Dev. Co.*, 607 N.E.2d 194, 199 (Ill. 1992), was similarly required to provide "reasons for the decision" pursuant to former Ill. Sup. Ct. R. 23.[4]

In contrast to the state cases, the Federal Rules of Appellate Procedure expressly acknowledge that some appeals will be decided without an opinion:

> (a) Entry. A judgment is entered . . . (1) after receiving the court's opinion . . . or (2) if a

3. Former Tx. RAP 90 is now codified as Tx. RAP 47.1.

4. The current version of Ill. Sup. Ct. R. 23 provides for the possibility of summary disposition without opinion.

> judgment is rendered *without an opinion*, as the court instructs.
>
> (b) Notice. . . . the Clerk must mail to all parties a copy of the opinion — or the judgment, *if no opinion was written*. . . .

Fed. R. App. P. 36 (emphasis added).

The Sixth Circuit Rules have likewise contemplated that some appellate decisions will be without a written opinion:

> In those cases in which the decision is *unanimous* and each judge of the panel believes that *no jurisprudential purpose would be served by a written opinion*, disposition of the case may be made in open court following oral argument.

Sixth Cir. R. 36 (emphasis added).

While the Sixth Circuit's ruling was not made in open court, the jurisprudential purpose behind Sixth Cir. R. 36 has been served in the case at hand. As the court indicated in its unanimous opinion, "the issuance of a detailed written opinion . . . would be duplicative and serve no useful purpose." (App., p. 3a). The opinion also follows the policy and practice of the Sixth Circuit which is to refrain from rewriting comprehensive district court opinions where the court is in full agreement. Otherwise, the district court would be deprived of its "careful consideration of the issues." *See Stephenson v. Duriron Co.*, 428 F.2d 387, 392 (6th Cir. 1970); and *E. W. Bliss Co. v. United States*, 351 F.2d 449, 451 (6th Cir. 1965).

Moreover, the failure of an appellate court to fully explain its decision in a written opinion[5] does not violate or implicate an appellant's due process rights under the Fifth Amendment. *See Harris v. Rivera*, 454 U.S. 339, 344, 102 S. Ct. 460, 464 (1981) ("[a]lthough there are occasions when an explanation of the reasons for a decision may be required by the demands of due process, such occasions are the exception rather than the rule"); *see also United States v. Garza*, 165 F.3d 312, 314 (5th Cir. 1999) (the right to appellate review does not "equate to a right to a full written opinion on every issue raised"); *Riggin v. Office of Senate Fair Employment Practices*, 61 F.3d 1563, 1571 (Fed. Cir. 1995) (failure of administrative agency to provide a detailed written opinion did not violate petitioner's due process rights); and *Grant v. Rivers*, 920 F. Supp. 769, 782-83 (E.D. Mich. 1996) (failure of Michigan Court of Appeals to better explain its dispositive opinion did not violate appellant's due process rights).

Consequently, Petitioner's rights have been properly vindicated by the appellate process, and no reason exists to justify the writ of certiorari.

III. THE SIXTH CIRCUIT PROPERLY APPLIED THE LAW WITH RESPECT TO PRETEXT.

McGuire argues that the courts below wrongly applied the law concerning stray and ambiguous remarks as well as that concerning the admissibility of statistical evidence. McGuire fails to understand that these issues are only relevant

5. Here the Sixth Circuit did explain the reasons for its decision; they just happened to be the same reasons as explained by the district court in its written opinion. (App., pp. 1a-3a).

at the pretext stage of proving a case of discriminatory demotion. McGuire completely ignores the fact that the courts below found that he failed to prove the first stage of his discriminatory demotion claim — the prima facie case.[6] (Pet., p. 17a). Thus, a review of whether McGuire presented sufficient evidence to show pretext will not alter the effect of the Sixth Circuit's decision. Nonetheless, the courts below properly applied the law with respect to pretext.

Respondent will not take up this Court's time with full recitation of the relevant cases which have been adequately set forth in the District Court's opinion (App., pp. 18a-19a); however, there are several flaws in McGuire's argument which merit some attention.

A. *Ambiguous and Stray Remarks.*

McGuire misinterprets the cases he relies upon to support his proposition that the evidence alleged[7] is sufficient to infer racial bias in his demotion. (Pet., pp. 10-11). Contrary to McGuire's contention, the cases cited in his Petition did not hold that a single derogatory remark by a supervisor was

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6. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973) sets forth the three prong burden shifting framework for proving a case of disparate treatment via circumstantial evidence.

7. McGuire alleges that Heath gave him a "Senior Citizen Port-a-Potty" gag gift at a Christmas party in 1996, that Heath referred to two individuals over 40 years of age as "inflexible" and "resistant to change," and that Heath once referred to McGuire as a "fat middle-aged man" or "old man" in response to McGuire's question of what his personal opinion was of him after Heath had just told McGuire that he thought McGuire would be a good candidate for a District Operations Manager position. (Pet., p. 7).

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sufficient to get the case to the jury. Instead, the cases held that certain remarks which appeared to be isolated or ambiguous when considered alone, were no longer isolated or ambiguous when combined with other less equivocal evidence of discrimination. *See White v. Honeywell, Inc.*, 141 F.3d 1270, 1273-74 (8th Cir. 1998) (the remark "[i]f the dumb nigger doesn't like it, she can sign out" by plaintiff's supervisor in response to plaintiff's complaint of racial harassment was admissible when considering the "totality of the circumstances," which included frequent references to the plaintiff as "little black bitch," "colored girl," "asshole," "jackass," "lazy and stupid"); *Cordova v. State Farm Ins.*, 124 F.3d 1145, 1149 (9th Cir. 1997) (decision-making supervisor's comment that plaintiff was a "dumb Mexican" and that he was hired because he was a minority was "not the only evidence [plaintiff] offers"); *Danzer v. Norden Systems, Inc.*, 151 F.3d 50, 53, 56 (2d Cir. 1999) (decision-making supervisor's reference to employees as "old fogies" in a meeting which also referenced the company's goal of getting younger people on board, could not be considered a stray remark when considered along with other indicia of discrimination which included an age chart of employees, sudden changes in evaluations, and references to "new blood" and "new cast of characters"); and *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998) (evidence sufficient to show pretext included statement by decision-maker that he "did not want to deal with another female," derogatory remarks about females at meetings, company sponsored trips which prohibited females, and a "Barbie doll kit" with two dildos and a bottle of Wesson oil given to a female employee).

All of the aforementioned cases, which were cited by McGuire, involve less ambiguous and more numerous

remarks than those involved in the case at hand. The cases are also in line with Sixth Circuit case law, also cited by McGuire, which states that remarks should not be considered in isolation. *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 356 (6th Cir. 1998). The same case acknowledges that the determination of whether a remark is stray also depends upon the substance of the remarks, and the role of the speaker in the employment decision. *Id.* at 355-56. With this concept in mind, the court held that the following comments by a supervisor, who played a meaningful role in plaintiff's termination, were not stray remarks: "he did not want any employee over 50 years old on his staff" and "this, company is being run by white haired old men waiting to retire, and this had to change." *Id.*

Here, none of the remarks alleged were made at the time of the decision to demote McGuire or by an individual who was responsible for the decision to demote McGuire. The decision to demote McGuire was made in February of 1997 by Lambert and Pearce, both individuals within the protected age group. Further, when placed in the proper context, McGuire's evidence reveals no discriminatory animus by Heath. McGuire admits that the individuals whom Heath referred to as resistant to change were in fact resistant to change. (R. 12, McGuire Depo. at 72). McGuire also admits that Heath's "fat middle-aged man" or "old man" comment was not meant to be insulting and was made only after Heath had told McGuire that he would be a good candidate for promotion. (R. 12, McGuire Depo. at 187-88). Finally, McGuire admits that the "port-a-potty" gift was intended to be a joke. (R. 12, McGuire Depo. at 183-84). Consequently, the Sixth Circuit was correct in determining that the aforementioned ambiguous evidence, which was unrelated to McGuire's demotion, was insufficient to show pretext.

B. *Statistical Evidence.*

The courts below properly excluded the "statistics" offered by McGuire which were derived by his wife. The statistics were excluded not merely because they are "not supported by any sort of 'expert' testimony (Pet., p. 12), but because McGuire offered "no explanation as to his methodology or reliability." (App., p. 13a). Without such an explanation, the "Court is left to assume the comparisons are valid and probative which it cannot do," (App., p. 13a) and which other courts have not done. *See Tinker v. Sears Roebuck & Co.*, 127 F.3d 519, 524 (6th Cir. 1997) (plaintiff's statistics could not show pretext where the record contained no information on methodology utilized or data upon which expert relied); *Carter v. Ball*, 33 F.3d 450, 456 (4th Cir. 1994) (excluding statistics offered without expert testimony as to methodology or relevance); and *Frazier v. Consol. Rail Corp.*, 851 F.2d 1447, 1452-53 (D.C. Cir. 1988) (same).

In an attempt to demonstrate the probative value of his statistics, McGuire improperly relies upon the case of *Dothard v. Rawlinson*, 433 U.S. 321, 97 S. Ct. 2720 (1977). Contrary to McGuire's assertion, *Dothard* does not hold that national statistics are probative in all cases. In *Aiken v. City of Memphis*, 37 F.3d 1155, 1166-67 (6th Cir. 1994), the Sixth Circuit found that *Dothard* did not compel the court to accept general population statistics. In *Dothard*, this Court assumed that the height and weight composition of the qualified labor pool did not differ from Americans generally. *Aiken*, 37 F.3d at 1166-67. The court in *Aiken* reasoned that unlike height and weight, the racial composition of the qualified labor pool may vary dramatically from the national population. *Id.* at 1167.

Likewise, it cannot be assumed that the age of the management workforce in Ashland, Kentucky does not differ significantly from the national workforce statistics used by McGuire which includes both salaried and hourly, management and non-management, for all occupations, even including laid off workers and the unemployed who are looking for employment. (R. 42, Reply Exhibit A). Courts have disregarded statistics on the basis of inappropriate comparisons even where the civilian labor force was substantially more refined than McGuire's data. *See Raskin v. Wyatt Co.*, 125 F.3d 55, 65-67 (2d Cir. 1997) (disregarding expert's report which compared the number of senior managers in plaintiff's age group with the general population of college educated people earning over $75,000.00 per year in a managerial occupation); and *Middleton v. City of Flint, Mich.*, 92 F.3d 396, 406 (6th Cir. 1996) (raw statistical comparisons to the general workforce of one city were not reliable indicators of race discrimination).

Here, the courts below rightly ignored McGuire's "statistical" evidence. Not only does McGuire fail to provide expert testimony as to the methodology and relevance of the statistics, he also fails to provide the supporting data needed to judge the reliability and probative value of the statistics. Furthermore, McGuire's statistics do not address the legitimate non-discriminatory reason articulated by Lowe's for McGuire's demotion. *See Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1469 (6th Cir. 1990) (statistics used to establish a prima facie case of age discrimination failed to rebut the employer's non-discriminatory reasons since they did not "establish that age played a part in any particular decision").

CONCLUSION

As the foregoing discussion illustrates, there are no compelling reasons for granting the Petition. Therefore, Respondent respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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